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In The Supreme Court of The United States

OCTOBER TERM 1963

GEORGE ANTHONY ROSSETTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETER J. HUGHES
HARRY D. STEWARD
303 "A" Street
Suite 202 Crabtree Building
San Diego 1, California

Counsel for Petitioner

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IN THE

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NO. _____

GEORGE ANTHONY ROSSETTI,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, George Anthony Rossetti, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 6, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of March 6, 1963, is not reported but is set forth in Appendix A, infra, pages 14-16.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 6, 1963 and is set forth in Appendix B, infra, page 17. A timely petition for rehearing filed April 5, 1963 was denied on April 16, 1963. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1), Rule 22 (2) Rules of the Supreme Court and Rule 37 (c) of Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Is it prejudicial error to allow the prosecution to call as a witness one involved in the offense with which accused is charged knowing the witness will claim a valid privilege against self-incrimination, particularly when the accused is precluded from cross-examination and the jury is not instructed concerning the effect of such testimony on the rights of the accused?

2. Should a motion for judgment of acquittal be granted where the evidence is slight, entirely circumstantial and consists only of innocent acts which point reasonably to the accused's innocence?

3. Should a new trial be granted in a close case where the accused discovers evidence after the trial

that tends to negate any inference of guilt arising from acts which the prosecutor contends constitute flight?

4. Is it constitutional to require one to declare, i.e., admit possession of, marijuana when to do so would give rise to a presumption of guilt under another Federal Statute?

STATUTES INVOLVED

The statutory provisions involved are, 21 U.S.C. 176 (a), 26 U.S.C. 4744, and 26 U.S.C. 5841. They are printed in Appendix C, infra, pages 18-20.

STATEMENT

Appellant and his co-defendants, JOSEPH PATRICK KASAMIS and PASQUALE FRANK CREA, were charged in a two count Indictment returned by the Grand Jury for the Southern District on March 14, 1962. In Count 1 co-defendant, JOSEPH PATRICK KASAMIS, was charged with the substantive crime under 21 U.S.C. 176 (a) of having imported thirty-five pounds of marijuana contrary to law and in Count 2 with having received, concealed and transported said marijuana. Appellant and co-defendant, PASQUALE FRANK CREA, were charged in each count with having aided, abetted, assisted, counseled, induced and procured the commission of the offenses under 18 U.S.C. 2.

Co-defendant, JOSEPH PATRICK KASAMIS, was separately tried by a jury and on April 12, 1962 was convicted of both counts of the Indictment. On June 29,

1962, four weeks after the conclusion of appellant's trial; KASAMIS was sentenced to imprisonment for a period of seven years on each count of the Indictment to run concurrently.

Appellant and his co-defendant, PASQUALE FRANK CREA, hereafter referred to as CREA, were jointly tried before a jury, commencing on May 29, 1962. At the conclusion of the government's case a motion for judgment of acquittal as to both counts of the Indictment was granted as to CREA. After the conclusion of all of the evidence, a motion for judgment of acquittal as to Count 2 of the Indictment was granted as to appellant. Appellant's motions for judgment of acquittal as to Count 1 were denied. On June 1, 1962 appellant was convicted by the jury as charged in Count 1 of the Indictment. Appellant's motions for judgment of acquittal as renewed after the verdict of the jury and for new trial were likewise denied and appellant was sentenced to seven years imprisonment. An appeal duly followed to the Court of Appeals for the Ninth Circuit which was denied. This petition seeks review of the court's action in denying the relief sought by appeal and the motion for rehearing which was duly presented.

The evidence adduced as to appellant during the trial was as follows:

On or about December 31, 1961, appellant left a 1952 Oldsmobile automobile at the Jet Center Motors in Lancaster, California. At that time appellant executed a consignment form and advised the co-owner of Jet Center Motors, Mr. Homer Bodun, that the car was to be sold for $150.00. The vehicle was on the car lot for "probably around thirty days". During this thirty day

period appellant was observed by Mr. Bodun "maybe two or three different times". CREA was observed with appellant at the lot on one or possibly two or three occasions. Thereafter the car was removed from the lot in some unknown manner. The car was registered to CREA and CREA'S ownership was established by the government in its response to appellant's motion for bill of particulars.

Appellant, KASAMIS and CREA were observed by a deputy sheriff "either the latter part of January or into February (1962) at the Wayside Cafe in Rosamond".

On February 20, 1962, two days before the offense and over 200 miles from the place where it occurred, appellant was observed talking to KASAMIS in front of the KASAMIS residence in Lancaster, California. Appellant and KASAMIS were observed departing in a red and white automobile at that time.

Later the same day, namely, February 20, 1962, KASAMIS was observed by a deputy sheriff driving the same 1952 Oldsmobile automobile. At this time the car was occupied by KASAMIS and CREA and was being driven toward Lancaster, California. A car registration was produced by CREA, which showed that CREA was the registered owner of said vehicle.

Appellant stipulated that he signed a registration card at the Holiday Inn Motel, San Ysidro, California. This card was identified as having been presented to the manager of said motel on the night of February 21, 1962 or in the early morning of February 22nd. Neither ROSSETTI nor any other individual was personally identified. Appellant's stipulation was the only evidence

tending to show he was even near the scene of the offense.

At or about 10:10 A.M. on February 22, 1962, KASAMIS was observed entering the United States from Mexico in said 1952 Oldsmobile. He had received the keys that morning in some unspecified manner. KASAMIS appeared to be extremely nervous and the car was thereafter searched. Marijuana was found on the floor mat of the back seat, under both fenders and in the trunk, which KASAMIS unlocked. A personal search of KASAMIS by a customs agent disclosed marijuana debris and seeds concealed in KASAMIS' pockets.

Appellant and his co-defendant, CREA, resided with their respective families at a multiple residence known as Actis Gardens, Mojave, California for over one year prior to February 22, 1962. Certain evidence was introduced by the government under an ostensible theory of flight. Said evidence tended to show that appellant's family moved from Actis Gardens on the afternoon of February 22, 1962, and returned to appellant's residence, Brooklyn, New York, where they lived in the same building with appellant's mother and brother.

Also, that appellant's daughter did not return to school after February 22, 1962 and that the school principal was not previously notified of her withdrawal from school. Appellant, in his motion for new trial, showed that the daughter's school teacher rather than the principal had been notified of a pending withdrawal during the week prior to February 22, 1962.

The government called KASAMIS as its first witness. Appellant's counsel, out of the hearing of the jury, promptly advised the court and government counsel

that KASAMIS had stated he would claim the privilege against self-incrimination and would not testify. KASAMIS asked for and received the right to consult with the attorney appointed for him by the court in connection with his own trial and defense. The witnesses' attorney, after consulting with his client, reiterated the claim of privilege and stated the grounds therefore, including that the witness had not been sentenced and therefore had not had an opportunity for appellate review, that he faced the real possibility of other prosecutions for conspiracy under 18 U.S.C. 371 and for tax violations under Title 26 of the United States Code.

The government, in apparent recognition of the validity of the claim, advised the court and counsel that immunity would be sought for the witness. However, this was not done and the government over appellant's objections, instead selected certain questions that had been previously asked of and answered by the witness when he testified, unsuccessfully, in his own defense. The three selected questions were:

> "Mr. Kasamis, did you enter the United States in a 1952 Oldsmobile, green and black, on Thursday morning, February 22, 1962?
>
> Did you open the trunk of that vehicle for a customs officer at that point?
>
> When did you receive the keys to that automobile which you were then operating?"

The witness was instructed by the Court to answer the questions after KASAMIS personally and through his

attorney refused to answer the questions. It is to be noted that the witness awaited sentence by this trial judge on his conviction of two counts where the penalty could have been as much as forty years or as little, comparatively speaking, as five years. Despite the coerced answers the privilege still existed and appellant's counsel could not cross examine the witness even though the transcript of the witness's testimony in his own trial showed that he had received the keys that morning from a man named Frank - not appellant. In fact, the witness exculpated appellant from any involvement in the offense but these facts could not be brought before the jury due to the claim validly asserted by the witness. Only the prejudicial inferences arising from the claim of privilege remained and these could not be rebutted. The government was quick to pounce on this evidence and compounded the error by arguing to the jury on five different occasions that appellant must have given the keys to the witness the morning of the offense.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is directly contrary to the holdings in three other Circuits. The Second Circuit in U.S. v. Maloney (2 CA, 1958) 262 F. 2d 535 held that it is reversible error to allow the prosecutor to call as a witness one involved in the offense with which accused is charged knowing he will claim the privilege against self-incrimination where the court does not give a cautionary instruction to the jury even though the accused does not request the instruction. The Seventh Circuit in U.S. v. Amadio, 215 F. 2d 650 and the Third Circuit in U.S. v. Tucker 267 F. 2d 212 are in accord with the Second

Circuit and are contrary to the instant case in the Ninth Circuit.

The precise question was before the Supreme Court of Coloardo in De Gesualdio v. People, 364 Pac. 2nd 374, 86 ALR 2d 1434. The court there was in accord with the Second, Third and Seventh Circuits and directly contrary to the Ninth Circuit. As evidence of the importance of this question the editors of ALR selected it for inclusion in their recent annotation, 86 ALR 2d 1434. Appellant submits that the instant holding is contrary to the holdings in the cases therein collected. Also contrary to the instant case are U.S. v. Hiss, 185 F. 2d 519, Washburn v. State, 299 S.W. 2d 706, and Johnson v. State, 252 S.W. 2d 463.

The all too frequent practice of the prosecution calling a witness who is implicated with the accused in the offense knowing the witness will validly claim the privilege against self-incrimination should not be condoned. It results in a prejudicial inference against the accused in the mind of the jury which cannot be rebutted. The inference created is that the witness, who the prosecutor asserts is connected or associated in some manner with the accused, has done something that he must conceal for fear of prosecution. This is the only reason the witness is called if the prosecutor knows the witness will not testify. It is guilt by association of the worst kind. In this case the government's entire case rested upon the asserted association of the witness and appellant. The government argued this point time and again and certain of the evidence was admissible only under the theory of association.

The prejudicial effect of precluding the accused

from exercising his inherent legal right to cross-examine witnesses who testify against him is even more startling in the instant case. The court allowed the prosecutor to select several isolated questions to be asked of the witness and then ordered the witness to answer. Because of the constitutional guarantee being exercised by the witness, the appellant could not show by cross-examination or otherwise that, contrary to the government's theory, the witness received the keys from someone other than appellant and that appellant did not aid or abet the witness in any manner. Please note that the witness had already been found guilty as a principal and that appellant was on trial for aiding and abetting the witness in that offense.

The entire procedure resulted in a prejudicial inference coupled with a denial of the right of cross-examination. The prosecutor here, with full knowledge of the claim and after recognizing the validity thereof, persisted in pursuing the matter before the jury over appellant's continued objections. Appellant also moved to strike the testimony, made motions for a mistrial, acquittal and new trial, all of which were overruled or denied. The court failed to instruct or otherwise caution the jury concerning the procedure followed by the prosecutor although the need for an appropriate instruction was indicated to the court by appellant and all other objections and motions were duly made.

2. The standard to be applied by the trial court on a motion for judgment of acquittal varies among the several Circuits. The situation is similar to that which existed concerning the correct instruction on circumstantial evidence before this Court decided Holland v. U.S., 348 U.S. 121. Judge Bartels in summarizing the

various rules in U.S. v. Wapnick (1962 E.D. N.Y.) 202 F. Supp. 712 states that the so-called "Beyond a Reasonable Doubt" standard is followed by the District of Columbia Circuit, the Fifth Circuit and the Ninth Circuit while the Second, Third, Fourth, Sixth and Tenth Circuits follow the so-called "Substantial Evidence" test. The remaining circuits apparently follow independent and differing standards.

One cannot glean from the opinion below what standard, if any, was applied as the Court merely stated "While a close case is presented, we cannot conscientiously state there is insufficient substantial, though circumstantial, evidence from which the jury could not have found defendant guilty." Appellant submits that the motion for judgment of acquittal would, as a matter of law, have been granted had the court below followed the reasoning and rule set forth by the Fifth Circuit in Cuthbert v. U.S. (1960) 278 F. 2d 220. The only evidence on matters prior to the offense tending to show that appellant aided and abetted KASAMIS was (1) association of an innocent nature on two occasions 200 miles from the place of offense, the first in January, 1962 and the second on February 20, 1962, (2) placing for sale on a car lot the instrumentality of the offense, i.e. the vehicle used by KASAMIS and owned by CREA, and (3) appellant's stipulation that he signed a registration card which was presented to a motel near the place of offense the night before. The Trial Court shortly before the conclusion of the evidence characterized the case against appellant and his acquitted co-defendant CREA as being "mere suspicion."

3. The prosecutor, under the theory of flight, introduced evidence of the moving of appellant's family from their residence in Mojave, California, to their home in Brooklyn, New York, after the offense. The

principal of the school where appellant's daughter attended testified that school records did not show any advance notice of withdrawal. Appellant, in his motion for new trial, produced the signed statement of the teacher of appellant's daughter that appellant's wife had advised the teacher on the preceding week that the daughter would be removed from school. Appellant's wife was in New York during trial and the facts pertaining to the prearranged departure procedure were not known or available to appellant. In addition, signed statements were presented from other prospective witnesses that they had been advised of appellant's intention to return to New York well before the date of the offense.

In a case such as this where the evidence is slight and entirely circumstantial, acts otherwise minor loom large indeed. Over fifty percent of the government case dealt with appellant's alleged flight. On a new trial the inference, if any, of guilt could be negated and an acquittal would undoubtedly follow.

4. Appellant contends that 21 U.S.C. 176 (a) is unconstitutional as requiring one to declare, i.e. admit possession of, marijuana which possession is presumptive evidence of guilt under 26 U.S.C. 4744. The Ninth Circuit in Russell v. U.S. 306 F. 2d 402 held 26 U.S.C. 5841 unconstitutional as it required one to register firearms, the possession of which gave rise to a presumption of guilt under 26 U.S.C. 5841. It is submitted that if it is unconstitutional to require the registration of firearms, the possession of which is presumptive evidence of guilt, it is equally unconstitutional to require the declaration of marijuana, the possession of which gives rise to a presumption of guilt under another federal statute.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER J. HUGHES
HARRY D. STEWARD

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ANTHONY ROSSETTI, Appellant,	)	
vs.	)	No. 18,255
UNITED STATES OF AMERICA, Appellee.	)	March 6, 1963

Appeal from the United States District Court
for the Southern District of California,
Southern Division

Before: BARNES and JERTBERG, Circuit Judges, and PENCE, District Judge

PER CURIAM:

This is an appeal from a conviction by a jury of knowingly aiding and abetting one Kasamis in smuggling thirty-five pounds of marijuana into the United States, 21 U.S.C. § 176(a); 18 U.S.C. § 2. The first point urged is the alleged insufficiency of the evidence to convict.

We have carefully reviewed the evidence introduced in the court below, the arguments made, and all instructions. While a close case is presented, we cannot conscientiously state there is insufficient substantial, though circumstantial, evidence from which the jury could not have found defendant guilty. The facts do not approach those found in Glover v. United States, 10 Cir. 1962, 306 F.2d 594, and are more nearly similar to those found in O'Neal v. United States, 9 Cir. 1962, 310 F.2d 175.

Appellant likewise claims error in the refusal to grant a new trial, because (a) the court admitted evidence relative to "flight," (b) failed to stri such evidence, and (c) instructed the jury on the theory of "flight." We find no error. Flight does not create a presumption of guilt (McFarland v. United States, 5 Cir. 1960, 273 F.2d 417, but: " 'It is today universally conceded that the fact of an accused's flight . . . /is/ . . . admissible as evidence of consciousness of guilt, and thus of guilt itself.' " Green v. United States, D.C.Cir. 1958, 259 F.2d 180, quoting 2 Wigmore, Evidence, § 276 (3d ed.). Having placed the appellant at the border motel between midnight and 6:00 A.M. on the morning of the smuggling, appellant's actions (after the government's discovery of the smuggling attempt) in traveling two hundred miles to his then residence, precipitiously packing and leaving his rented premises, taking his daughter out of school, and departing from the state with his close friend, Crea, were all facts for the jury to weigh and ponder, and to determine the weight which should be attached to each, if any.

Appellant next urges error because the trial judge (a) permitted defendant Kasamis (previously convicted

of the smuggling) to testify (as he had done at his own trial), by answering three questions, and (b) failed to instruct the jury on such testimony. Any objection to either procedure was waived. No instructions, cautionary or otherwise, were proffered or objected to.

Finally appellant claims 21 U.S.C. § 176 (a) is unconstitutional. We have held otherwise in Caudillo v. United States, 1958, 253 F. 2d 513, and we are given no reason to rule otherwise.

Finding no error, we Affirm.

(Endorsed) Per Curiam Opinion Filed March 6, 1963.

Frank H. Schmid, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE ANTHONY ROSSETTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 18255

JUDGMENT

APPEAL from the United States District Court for the Southern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 6, 1963

United States Code, Title 21, § 176a.

§ 176a. Smuggling of marihuana; penalties, evidence; definition of marihuana

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, § 2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570.

United States Code, Title 26

§ 4744. Unlawful possession.

(a) Persons in general. - It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) - -

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a). As amended July 18, 1956, c. 629, Title I, § 101, 70 Stat. 567.

U. S. Code, Title 26

§ 5841. Registration of persons in general

Every person possessing a firearm shall register, with the Secretary or his delegate, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with. Aug. 16, 1954, 9:45 a. m., E.D.T., c. 736, 68A Stat. 725.

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Statute involved:

Narcotic Drugs Import and Export Act, as amended:	
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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1099

GEORGE ANTHONY ROSSETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 14-16) is reported at 315 F. 2d 86.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1963 (Pet. App. B, 17). A petition for rehearing was denied on April 16, 1963. The petition for a writ of certiorari was filed on May 15, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the court to permit the government to call to the stand a witness to answer three questions which, at a hearing outside the presence of the jury, the judge had indicated were not subject to a claim of privilege.
2. Whether the evidence supports the verdict.
3. Whether a motion for a new trial was properly denied.
4. Whether the statute prohibiting smuggling of marihuana is unconstitutional as requiring a self-incriminatory admission of unlawful possession.

STATUTE INVOLVED

The Narcotic Drugs Import and Export Act, as amended, Sec. 2(h), 70 Stat. 570 (21 U.S.C. 176a):

> Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned

not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

* * * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California of aiding and abetting one Kasamis to smuggle 35 pounds of marihuana into the United States, in violation of 21 U.S.C. 176a and was sentenced to seven years' imprisonment. Kasamis had been separately tried and convicted before the trial of petitioner and his co-defendant Crea (who was acquitted).

1. The government's evidence showed that on February 22, 1962, Kasamis was stopped as he entered the United States at San Ysidro, California, in a green and black Oldsmobile. Approximately 35 pounds of marihuana were found in the car (2 R. 50-66, 120-121).

Petitioner, who lived in Mojave, California, had left the Oldsmobile for sale at a lot in Lancaster, California, on December 31, 1961, with a document asserting title in his own name, but the car was not sold from the lot. During January, 1962, petitioner had been seen on the lot at least once with Crea, who also lived in Mojave (2 R. 89-95; 3 R. 159, 163, 245). Petitioner, Kasamis and Crea had been seen together at a cafe in Rosamond, California, in late January or February, 1962 (3 R. 218-220).

On February 20, 1962, at about 11:30 a.m. petitioner drove to the house where Kasamis lived in Lancaster, California, and, a few minutes later, drove off with Kasamis in a car other than the Oldsmobile (2 R. 111-115, 119). At about one o'clock that afternoon, Kasamis and Crea were seen in the Oldsmobile driving south on the Kern County-Los Angeles line. When stopped, Crea produced a registration certificate for the car in his own name (2 R. 96-107, 123). Kasamis testified that he received the keys to the Oldsmobile on February 22, 1962 (2 R. 84).[1] Sometime between midnight and 6 a.m. on February 22, 1962, petitioner registered at the Holiday Inn in San Ysidro, California, two blocks from the port of entry from Mexico. He gave his correct name on the registration card, and recited that there were two other persons with him, but gave a Lancaster address (3 R. 148-150, 216, 248).

Kasamis, at the time of leaving his mother's house, was without funds of his own, and when apprehended

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[1] The circumstances concerning claim of privilege by Kasamis are set forth *infra*, pp. 5-6.

reentering the United States on February 22, had less than a dollar (2 R. 114, 121). The current price for 35 pounds of marihuana across the border from San Ysidro was from $350 to $720 (3 R. 197-198; and see 3 R. 269). Petitioner and Crea had previously received about $500 as the outcome of some litigation (3 R. 180, 187).

On the afternoon of February 22, after Kasamis's arrest, petitioner and Crea and their families left their homes at Mojave, California, without notice to the manager or to the principal of the Mojave elementary school which petitioner's daughter attended. The daughter was playing with a friend in Mojave after school,[2] up to 4:00 or 4:30 of that afternoon (2 R. 124, 126-127; 3 R. 152-154, 158-161, 165-166, 221-224). When petitioner was arrested on March 13, 1962, in Brooklyn, New York, he told the government agent that he had left California on February 19, 1962 (3 R. 177-179).

2. Before Kasamis was called, defense counsel said that he had been informed that Kasamis would claim the privilege against self-incrimination and would not testify for the government or defense (2 R. 47-48). Counsel for Kasamis was called in and further colloquies were held outside the presence of the jury. Kasamis, who had given a statement on February 26, had been convicted but had not yet been sentenced. His attorney informed the court that the privilege against self-incrimination would be claimed as to all

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[2] The school was in session on February 22, Washington's Birthday (3 R. 154).

testimony, in view of possible conspiracy or tax charges and because of the possible effect of any testimony on the sentence yet to be imposed (2 R. 72-75). Government counsel stated that Kasamis would be asked only three questions, which he had already answered at his own trial and the judge indicated that the privilege would not apply (2 R. 74-76).

Before the jury, government counsel asked Kasamis whether he entered the United States in a 1952 green and black Oldsmobile on February 22, 1962 (2 R. 79). After a claim of self-incrimination and discussion at the bench of the witness' testimony at his trial, the witness was directed to answer. He testified "Yes, I did" (2 R. 82-83). The witness further testified that he opened the trunk of the car for the customs inspector. To the question as to when he received the keys to the automobile he replied, "I don't remember exactly" (2 R. 83). Upon being shown the prior transcript, he replied, "February 22nd, I believe; Thursday" (2 R. 84). Petitioner's counsel chose not to cross-examine Kasamis (2 R. 87-88).

3. Petitioner moved for a new trial, on the basis, *inter alia*, of a written statement, dated June 14, 1962, (after the trial of the case) by the teacher of petitioner's daughter. It read as follows (1 R. 53):

> Mary Lou Rossetti came to see me at school, Friday, February 16, 1962, to ask me about checking Deborah, her daughter, out of school. She stated at that time that she was not sure just when they would be leaving. I gave her Deborah's report card, and told her the school records would be sent on when requested by the

> new school where she would be enrolled. She could not request a transfer as yet, for Deborah would still be in school for a few more days.

Petitioner also listed five persons who were "aware" that petitioner "planned to leave the Mohave area" (1 R. 54). He presented a written statement of the part owner of petitioner's residence, that it was "known" to him that petitioner "had planned to leave sometime the last of February or first of March," for New York or Arizona (1 R. 59).

In opposition (1 R. 56-58; 64-75) the government presented, *inter alia*, a further written statement by the school teacher, that she had informed petitioner's wife, at the February 16 interview, that "the normal procedure was to advise the front office of the Mojave Elementary School of the time of moving" and also to advise the officials of the new school of the attendance at Mojave so that they would send for the daughter's records. The teacher was not advised, on February 22, that the daughter would no longer be in school (1 R. 73-74).

The government also presented the portion of transcript of the trial of Kasamis in which a government agent testified to admissions by Kasamis on February 26, 1962. Kasamis had said that two men, known to him as George and Patty, told him that they had just obtained $500 and asked him to drive some marihuana into the United States which they would sell in New York. On February 20, 1962, "George" had picked him up at his home, and driven him to the Astic Gardens at Mojave from where Kasamis drove on in the Oldsmobile with "Patty" ("George" fol-

lowing in another car). The marihuana was not available in Tia Juana on the night of February 20, so all three spent the evening of February 21 at the San Ysidro Holiday Inn motel. They returned to Tia Juana on the morning of February 22, and Kasamis drove the Oldsmobile back to San Ysidro (1 R. 70-72).

At the hearing on the motion, petitioner was permitted to call his wife to the stand. She testified only to her absence from California at the time of the trial, and not to any matters in explanation of the departure on February 22, 1962 (4 R. 347-348).

ARGUMENT

1. The question of the right to call Kasamis to the stand was carefully explored outside the presence of the jury with Kasamis represented by his own counsel. The government stated that it intended to confine itself to three questions which it deemed proper in view of the testimony which Kasamis had given at his own trial. The court upheld the government's right to ask these questions. Before the jury, the witness, with his counsel present, after again raising a claim of privilege which was overruled, answered the three questions. Under these circumstances, no rights of petitioner were violated. *Namet* v. *United States* No. 134, this Term, decided May 13, 1963. The inferences which the government asked the jury to draw were from the testimony, not from silence.

Petitioner argues that, in view of the assertion by the witness that he would claim the privilege,

petitioner could not by cross-examination or otherwise show that Kasamis received the keys to the car from someone other than petitioner (Pet. 10). But petitioner could have, as the government did, ask the court to rule on the propriety of specific questions, relating to the subject matter of direct examination—the keys to the car. The court might well have directed the witness to answer and the witness might well have answered. Petitioner did not choose to test out the issue. There is, accordingly, no foundation for the claim that petitioner was curtailed in his right of cross-examination. As in *Namet*, there was here neither a conscious attempt to build the government's case out of inference arising from use of the testimonial privilege nor any refusal to answer in a form not subject to cross-examination.

2. The sufficiency of the evidence to go to the jury presents no question warranting review by this Court. However the standard may be phrased, a case is properly presented to the jury if the evidence is such that a reasonable man drawing reasonable inferences from the evidence could find guilt beyond a reasonable doubt. See *Holland* v. *United States*, 348 U.S. 121. Here the evidence disclosed that the actual smuggler was without the funds to buy the marihuana found in the car. Petitioner had access to the funds and the car. Petitioner was seen meeting with the smuggler shortly before the trip to Mexico; he was at the port of entry on the day the smuggling attempt was made. After the smuggling attempt proved unsuccessful, petitioner hastily de-

parted from his home with his family. From this combination of circumstances the jury could conclude that guilt was established beyond a reasonable doubt.

3. Similarly, the denial of the motion for a new trial presents no issue for review. At most the motion for a new trial showed only that petitioner and his wife had, before February 22, contemplated leaving California at some undetermined future time. It does not explain or negate the fact that removal on February 22 was precipitous.

4. Petitioner contends that the statute prohibiting smuggling of marihuana into the United States is unconstitutional in that it requires a self-incriminatory admission of possession of the marihuana. The short answer is that the customs declaration at the border is prospective, relating to what is sought to be brought into the United States, rather than an admission of a past offense already completed. No one is compelled to bring in marihuana. See *United States* v. *Kahriger*, 345 U.S. 22, 32-33; *Lewis* v. *United States*, 348 U.S. 419, 422-423.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

JUNE 1963

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 689522 1233

Office-Supreme Court, U.S.
FILED
NOV 5 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 130

GEORGE ANTHONY ROSSETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

JEROME LEWIS
Attorney for Petitioner

JACOB W. HELLER
DAVID DRETZIN
of Counsel

Dated: November 4, 1963

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its Order of October 14, 1963, denying the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit, in the above entitled case.

The Facts

Petitioner was convicted of aiding and abetting one Kasamis to smuggle narcotics into the United States, in violation of 21 U.S.C. § 176a, and was sentenced to a prison term of 7 years. The Court of Appeals, while affirming the conviction, expressly recognized in its opinion below that a

"close case is presented". (315 F. 2d 86). It consisted entirely of circumstantial evidence, the items of proof, which we here summarize for the convenience of the Court, being as follows:

Kasamis, who had been separately tried and convicted prior to petitioner's trial, was apprehended on February 22, 1962 at 10:30 A.M. as he entered into California from Mexico. He was driving a green and black 1952 Oldsmobile in which 35 lbs. of narcotics were concealed. About two months before, petitioner had placed the green and black Oldsmobile (registered in the name of one Crea, a co-defendant who was tried with petitioner and acquitted) for sale in a lot in Lancaster, California. Petitioner had been seen together with Kasamis on occasion and on February 20, 1962 had been seen driving off together with Kasamis from the latter's home. During the night of February 21, 1962, petitioner registered at a motel in San Ysidro, California, near the port of entry.

Two other items of evidence of great significance at petitioner's trial bear mention. They are integrally related to the grounds for rehearing advanced below. (1) Kasamis, after invoking the Fifth Amendment, testified at petitioner's trial, over the objection of counsel, that he had received the keys for the green and black Oldsmobile on the morning he was apprehended—the inference from the invocation of the Fifth Amendment being that petitioner had given him the keys; and (2) there was evidence that petitioner and his family moved from their residence in the Lancaster, California area (approximately 200 miles from the port of entry) on the afternoon of February 22, allegedly removing

their daughter from school without giving prior notice to the principal.*

Reasons for Granting Rehearing and Issuing the Writ

On this petition for rehearing, we respectfully urge that denial of certiorari be reconsidered in the light of two recent decisions by this Court, which were evidently unavailable to prior counsel for petitioner at the time the application for certiorari was originally made. (Petitioner's present counsel was retained subsequent to the denial of the petition). The decisions to which we advert are *Wong Sun* v. *United States*, 371 U.S. 471 (1963), relating to the issue of flight, and *Namet* v. *United States*, 373 U.S. 179 (1963), bearing upon the testimony of Kasamis which had been introduced with knowledge by the prosecutor that the Fifth Amendment would be invoked. These decisions throw into severe question the two principal bases for petitioner's conviction. Indeed, in our view, these decisions not only render petitioner's conviction improper, but also, as we shall demonstrate, engender far broader questions, which require resolution by this Court, relating to the general administration of Federal criminal justice.

(A)

In the *Wong Sun* case, *supra*, one of the issues presented was the existence of probable cause for the arrest of one

* It was shown upon a motion for a new trial that about a week before February 22, the daughter's teacher had been notified that the family would be moving. Petitioner was arrested in Brooklyn, New York, on March 13, 1963. He was openly residing in the same building as his mother and brother and concededly had not made any effort to conceal his identity (Tr. 178, 182).

Toy. The evidence showed that when Toy was confronted at the door of his laundry shop by Federal narcotic agents, he immediately slammed the door and ran down the hall (371 U.S. at p. 474). The Government urged that Toy's flight provided sufficient basis for probable cause (Id. at p. 482). The Court, expressly rejecting this contention, held that "Toy's refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion" (Id. at p. 483).

In a footnote to this holding, Mr. Justice Brennan, writing for the Court, equated the situation there presented with the use of evidence of flight as corroborative proof of guilt, noting that the "two questions are inescapably related"; and proceeded to deplore the use of such evidence (Id. at p. 483 n. 10). Thus, the Court stated:

> "It is relevant to the present case that we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In Alberty v. United States, 162 U.S. 499, 511, this Court said:
>
> "* * * it is not universally true that a man who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper,' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'" (Ibid.)

It is of especial relevance to this case, that the Court in amplification of its position in *Wong Sun* quoted with approval from the cases of *Vick* v. *United States*, 216 F. 2d 228, 233 (5th Cir. 1954) and *Cooper* v. *United States*, 218 F. 2d 39, 41 (D.C. Cir. 1954). In the *Vick* case defendant was convicted of operating an illegal still. The principal evidence against him was that he was found by Federal agents in the woods near the still, and that he attempted to flee from the arresting officers. The Court of Appeals there held that "One motive is about as likely as another. Appellant may be guilty but his conviction cannot rest upon mere conjecture and suspicion" (216 F. 2d at p. 233). In the *Cooper* case defendant was convicted of robbery. The sole evidence against him, which is strikingly similar to the present case, was that he had purchased the get-a-way car, was a friend of one of the robbers, and that he had asked a cousin of his to say that she was with him in another State on the day of the robbery. The Court of Appeals, in reversing the conviction, noted that "After all, innocent people caught in a web of circumstances frequently become terror-stricken" (218 F. 2d at p. 41).

We believe that the tenuousness of the circumstances implicating petitioner in this case far exceeded those presented in *Vick* and *Cooper* where the convictions were reversed. Over one-half of the Government's proof against petitioner in this case consisted of evidence as to the alleged flight of petitioner and his family from their home (over 200 miles from the port of entry) on the day that Kasamis was arrested—even though there was not a shred of evidence that petitioner saw or communicated with Kasamis on that day, or that he was other than a mere friend, or for that matter, that petitioner knew or had reason to know

that Kasamis had been arrested. The jury was permitted to consider this evidence as to flight over the objection of counsel. It no doubt weighed heavily in their minds and tipped the scales in this admittedly "close case" against the petitioner.

Indeed, we submit, this was recognized by the Court below. The Court of Appeals in its opinion recounted the evidence as to alleged flight and found "no error" in its admission, the failure of the trial court to strike the evidence, or its permitting the jury to consider it. The Court of Appeals wrote (315 F. 2d at p. 86):

> "Flight does not create a presumption of guilt (*McFarland* v. *United States*, 5 Cir. 1960, 273 F. 2d 417), but: 'It is today universally conceded that the fact of an accused's flight . . . is . . . admissible as evidence of consciousness of guilt, and thus of guilt itself.' *Green* v. *United States*, D.C. Cir. 1958, 259, F. 2d 180, quoting 2 Wigmore, Evidence, §276 (3d ed.)."

We urge that the holding below is directly contrary to the rule announced by this Court in *Wong Sun* and the *Vick* and *Cooper* cases approved therein. Review is therefore indicated to correct this variant approach to the role of alleged flight in a Federal criminal prosecution. In the event it was not the intention of this Court to promulgate any rules in *Wong Sun* as to the admission of proof as to flight, we respectfully urge that the position of this Court requires clarification. The formulation of precise rules for the guidance of the lower Federal Courts on this issue is appropriate; and consistency in the administration of Federal criminal justice would be promoted thereby.

(B)

In assessing the crucial factors which influenced the conviction of petitioner in this case, we submit that the testimony of the smuggler, Kasamis, and the inferences drawn from his invocation of the Fifth Amendment, stand on equal footing with the evidence as to flight. The Government with prior knowledge that Kasamis would invoke the privilege against self-incrimination (and after indicating that immunity should be obtained to preclude any prejudice—but it was not) called him as a witness. After refusing to testify on the grounds of self-incrimination and being directed by the Court to do so, Kasamis testified that he received the keys to the green and black Oldsmobile on February 22, 1962. It was independently disclosed to the jury that the green and black Oldsmobile which Kasamis drove when apprehended had previously been put up for sale by petitioner; and that petitioner happened to be near the port of entry on the night of February 21. Under these circumstances, the obvious and irresistible inferences drawn by the jury from the testimony of Kasamis as to the keys, following upon his initial refusal to answer, was that he refused to answer because he was protecting a friend, namely, the petitioner who had given him the keys. Such inferences were of a most prejudicial nature. The prejudice was heightened by the stress given this testimony by the prosecution during summation. It was urged at least 5 times that petitioner was the one who gave Kasamis the keys to the Oldsmobile on the morning of February 22.

The situation thus presented in this case is precisely one recognized by this Court in its recent decision in the *Namet* case, supra, as calling for reversal of a criminal conviction.

In *Namet*, the petitioner was convicted of violating the Federal wagering tax law. Two witnesses were called by the prosecutor with knowledge that they would invoke the privilege against self-incrimination. Mr. Justice Stewart writing for the majority of the Court reviewed the prior decisional law on the subject and recognized the rule that the calling of a witness with knowledge that the privilege would be invoked is error for the reason of (1) prosecutorial misconduct, or (2) that "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant" (373 U.S. at p. 187). It was noted, however, that notwithstanding the presence of one of these elements in a given case, reversal may be avoided where (1) "such episodes were 'no more than minor lapses through a long trial.' *United States* v. *Hiss*, 185 F. 2d 822, 832 (C.A. 2nd Cir.)" (Ibid.); or (2) cautionary instructions to the jury to disregard the episodes were given. (Ibid.; see e.g. *U.S.* v. *Gerhie*, 252 F. 2d 664 [2nd Cir., 1958]; *Weinbaum* v. *U.S.*, 184 F. 2d 330 [9th Cir. 1950]; *U.S.* v. *Cioffi*, 242 F. 2d 473 [2nd Cir., 1957]; *U.S.* v. *Romero*, 249 F. 2d 371 [2nd Cir., 1957]; see also *U.S.* v. *Maloney*, 262 F. 2d 535, 538 [2nd Cir., 1959]).

In *Namet*, the episodes presented at trial were viewed by the Court as "no more than minor lapses" in accordance with the *Hiss* case, supra; and, hence, not reversible error. Thus, Mr. Justice Stewart wrote:

> "We cannot find that these few lapses, when viewed in the context of the entire trial, amounted to planned or deliberate attempts by the Government to make capital out of witnesses' refusals to testify" (373 U.S. at p. 189).

Defense counsel moreover, had "failed to object on behalf of the defendant" (Ibid). Counsel there represented not only the petitioner but also the two witnesses who had invoked the privilege (Id. at p. 180). The objections which he did take were on the ground of the *witness'* privilege and not the petitioner's right to a fair trial, free of prejudicial inference (see, e.g., Id. at pp. 181, 184). In "many instances", counsel, in fact, "actually acquiesced" (Id. at p. 189). Mr. Justice Stewart further wrote:

> "Nor can we find that the few invocations of privilege by the Kahns were of such significance in the trial that they constituted reversible error even in the absence of prosecutorial misconduct. The effect of these questions was minimized by the lengthy nonprivileged testimony which the Kahns gave * * * Thus, the present case is not one, like *Maloney*, in which a witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant. In this case the few claims of testimonial privilege were at most cumulative support for an inference already well established by the nonprivileged portion of the witness' testimony" (Ibid.).

In contrast to *Namet*, the saving circumstances which obviated error there are entirely absent in the case of bar. The situation presented, in fact, falls squarely within the orbit of prejudicial error there defined. Cast upon the scant background of the other evidence adduced against petitioner in this case, the inferences from the refusal of the witness to testify as to the keys to the car, constituted one of the principal, if not "the chief source" for inferring criminal involvement on petitioner's part (see also, *U.S. v. Cardillo*, 316 F. 2d 606, 611-13 [2nd Cir., 1963]). In this

particular case, then, the episode, can hardly be viewed as a "minor lapse" in a long trial; nor can it be said that its effect was "minimized by the lengthy nonprivileged testimony" of the witness. Objection, moreover, was duly taken on behalf of petitioner—in his interest and not on behalf of the witness, as in *Namet*.

Significantly, no cautionary instruction was given in this case, which might have arguably saved the day for a fair trial for petitioner. This we submit was the very minimum to which he was entitled. While such an instruction was not expressly requested by counsel for petitioner, the need for some instruction on the subject was called to the Court's attention (Tr. 236, 239). Under the decision in the *Maloney* case, supra (262 F. 2d 535), however, the failure to give a cautionary instruction is deemed "plain error" and a request, in consequence, is unnecessary. This very question was expressly left open by this Court in the *Namet* case. Thus, it was noted (373 U.S. at p. 190, n. 10):

> "Finding, as we do, that this case involves neither misconduct by the prosecution nor inferences of material importance, we need not pass upon the holding in *United States* v. *Maloney*, *supra*, that a failure to give proper curative instructions when such elements are present constitutes plain error."

This case we believe presents an appropriate occasion for resolution of this question. The requisite prejudice prescribed in *Namet* has been shown; and in its present posture the decision by the Ninth Circuit below stands contrary to the decisions of the other Circuit Courts who have previously passed on the question. They have unanimously held as this Court recognized in *Namet* that where the episode

is not a "minor lapse in a long trial", but is rather related to one of the crucial or "chief" sources for inferring guilt, as here, the cautionary instructions must be given (See cases cited at p. 8, *supra*).

The problem presented in this case is an oft-recurring one. We believe that a rule of procedure can be formulated by this Court whereby the possibility of prejudice may be effectively obviated in cases where the prosecution knows that a prospective witness will invoke the Fifth Amendment. We submit that when such a circumstance is known to a prosecutor, the trial court should be required to hold a preliminary hearing outside the presence of the jury and pass upon the propriety of the claim of privilege. If in its view the claim is warranted, the prosecutor should be enjoined from calling the witness. If it is unwarranted, the prospective witness should be instructed that he must answer the questions when posited in Court, and that he may not invoke the privilege, under penalty of contempt. Grant of the petition in this case will thus also afford this Court the opportunity to consider and promulgate such a necessary rule for the guidance of the lower Federal Courts.

CONCLUSION

The errors by the Courts below to which we have directed this Court's attention in the light of the recent decisions in *Wong Sun* and *Namet*, loom large in the posture of this case. Concededly, as the Court of Appeals noted below, a "close case" was here "presented". In this setting, as this Court held in *Glasser* v. *United States*, 315 U.S. 60, 67 (1942), even the slightest error is sufficient to tip the delicately poised

scales of justice. As a result of the evidence as to flight and the inferences from the invocation of the Fifth Amendment by Kasamis, petitioner was deprived of a fair trial.

Wherefore, petitioner respectfully prays that rehearing be granted, and upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioner

JACOB W. HELLER
DAVID DRETZIN
of Counsel

Dated: November 4, 1963

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JEROME LEWIS
Attorney for Petitioner

Dated: November 4, 1963